

America Needs Independent Voices Producing TV Programs

Prominent Television Executives Think So:

*"The big, bad truth that is that the four networks have reconstituted themselves into the oligopoly the FCC originally set out to curb back in the 1960s. They're now on the verge of controlling the same number of households The Big Three did 40 years ago. The independents are dying in droves. Where do new, fresh-thinking young people go today? Once upon a time, there were hundreds of places they could go to try their imaginations, to get new wings. Now, they are up against a few vertically integrated monoliths... We need more regulation, not less."*¹

Barry Diller, former President of Fox Television

*"Further media consolidation will come 'at the terrible cost of fewer voices.'"*²

Ted Turner, former President of Turner Broadcasting and
Vice Chairman of AOL/Time Warner

*"Horizontal integration can be useful if you don't let it 'factory-ize' creative production. ... But where people got fouled up was in vertical integration. Saying you need to buy something to provide content for your network is bullshit -- you can get product from anywhere."*³

Jeff Bewkes, AOL Time Warner Entertainment & Networks Group
Chairman and former head of HBO

*"(W)hen a CEO vertically integrates, he or she is so sold on this self-containment that it has led to some of the worst business decisions that I've seen in the 38 years that I've been in the business -- the worst."*⁴

Dick Robertson, president of Warner Bros. Domestic Television Distribution

Independent Researchers Think So:

*"If the viewing of all properties owned by the parent companies — Disney, NBC and Viacom — is totaled, those companies now directly control television sets in over a third of the TV households. Add AOL, Fox and networks likely to see consolidation over the next few years (Discovery, A&E, EW Scripps, etc.), and five companies or fewer would control roughly the same percentage of TV households in prime time as the three nets did 40 years ago. The programming oligopoly appears to be in a process of rebirth."*⁵

Tom Wolzien and Mark McKenzie, media analysts, Sanford C. Bernstein & Co.

¹ Keynote Speech of Barry Diller to NAB Convention, April 7, 2003. "Diller warns broadcasters about perils of deregulation," Hollywood Reporter, April 8, 2003, p. 8.

² "Turner Bemoans Big Mergers," Atlanta Journal-Constitution, January 28, 2003.

³ "Is H'wood's biz model outdated?" Variety.com, December 11, 2002.

⁴ Chris Pursell, "Bigger is better for syndie launches," Electronic Media online, January 31, 2003.

⁵ Tom Wolzien and Mark McKenzie, "Returning Oligopoly of Media Threatens Cable's Power," Bernstein Research, Sanford C. Bernstein & Co., February 7, 2003.

*"NBC already is losing its lead in a number of important areas such as scripted programs, and it hasn't been able to develop any replacement hits of note this season... Part of the problem is that NBC has relied too heavily on its own NBC Studios to solve its big problems, all because it doesn't want to face big license fee renewals if a series succeeds."*⁶

Deana Myers, analyst at Kagan Global Media

Prominent Columnists and Editorialists Think So:

*"Should we totally deregulate the public airwaves and permit the dwindling of major media down to a precious few? Should we reduce choices available to cantankerous individualists who do not want their information and entertainment limited by increasingly massive mass media? Does this make me (gasp!) pro-regulation? Michael Powell, appointed by Bush to be F.C.C. chairman, likes to say 'the market is my religion.' My conservative economic religion is founded on the rock of competition, which — since Teddy Roosevelt's day — has protected small business and consumers against predatory pricing leading to market monopolization."*⁷

William Safire, The New York Times

*"No matter where you turn, corporate sameness is pervasive... So much for the brilliant diversity of the 500-station universe! There's no mystery as to why corporate stewardship is synonymous with corporate blandness. Big companies are risk-averse, especially in tough economic times. They like to play it safe, which is fine except for one factor: Innovation spurs growth, and innovation demands risk. Whoops! There are growing signs that people are impatient with sameness..."*⁸

Peter Bart, Editor, Daily Variety

*"(T)he broadcast networks are more interested in financial deals than putting the best shows they can find on the air."*⁹

Editorial, Advertising Age, 1999

Presidents of the United States Think So:

*"As you know, I consistently favor government efforts to promote vigorous competition. However, I am convinced that market conditions in the television broadcasting and production industries at this time make the consequences of repeal uncertain. After giving careful consideration to the matter, I have decided to support a two-year legislatively-mandated moratorium on any change in the FCC Financial Interest and Syndication Rules."*¹⁰

President Ronald Reagan

⁶ "NBC's Strategy to Replace Hit Series, Mermigas on Media, *Television Week*, April 2, 2003.

⁷ William Safire, "On Media Giantism," The New York Times, January 20, 2003.

⁸ Peter Bart, "Shaking off the blahs," Daily Variety, January 19, 2003.

⁹ William T. Bielby and Denise D. Bielby, Sociology Department, University of California, Santa Barbara, "Controlling Primetime: Organizational Concentration And Network Television Programming Strategies," forthcoming article in *Journal of Broadcasting and Electronic Media*, pp. 12-13, quoting *Advertising Age*, May 31, 1999, p. 42.

¹⁰ Draft letter to Senator Pete Wilson (CA) dated November 1, 1983. Final letter sent over signature of Edwin Meese III, Counsellor to the President, dated November 2, 1983.

*"(S)mall business owners represent the enterprise of the whole nation and the diverse talents of our people. Nearly 40 percent of small firms are owned by women. Close to 15 percent of America's small business owners come from minority groups... America's economy can thrive only when our small businesses thrive."*¹¹

President George W. Bush

Even Bob Wright and Bob Iger Think So. At least, they used to.

*"From both a creative and business perspective, it is in our self-interest to do everything we can to promote a strong independent production community."*¹²

Robert C. Wright, President and CEO of NBC

(That was in 1990. Today, NBC owns all or a substantial portion of all the new series it premiered in the 2002-3 season.)¹³

*"If the (Financial Interest and Syndication) rules were repealed and we could flexibly support new creative talent in the same way that studios can today, the public would benefit through more innovative and diverse programming -- programming that could be produced without the big-studio trademark associated with it."*¹⁴

Robert A. Iger, then President of ABC Entertainment,
now President and COO of Disney (owner of ABC)

(That was in 1990. Today, almost all of ABC's new programming has Disney's own "big studio" trademark. Today, ABC wants *"to produce creative results that result in more Disney product on ABC and also allows us to achieve economies of scale. Clearly, the goal here is to direct as much of the studio's development to its distribution outlet, which is ABC....[W]e're approaching this to drive as much product as possible to ABC and have the people at the network involved, without the Chinese walls that existed in the past."*¹⁵)

Pat Fili-Krushel, former ABC Television Group President

¹¹ President George W. Bush, nationwide radio address, January 16, 2003.

¹² Statement of Robert C. Wright, *In the Matter of the Evaluation of the Syndication and Financial Interest Rules*, MM Docket No. 90-162, En Banc Hearing, December 14, 1990, p. 2.

¹³ Beilby and Bielby, Table 1, p. 40. *Table Attached*.

¹⁴ Statement of Robert A. Iger, *In the Matter of the Evaluation of the Syndication and Financial Interest Rules*, MM Docket No. 90-162, En Banc Hearing, December 14, 1990, pp. 3-4.

¹⁵ Bielby and Bielby, p. 29.

Table 1. Percent of Pilots and New Series Owned Fully or in Part by Broadcast Networks, 1990-2002

PILOTS							NEW SERIES					
Year	Number	Percent Owned Fully or in Part by Network					Number	Percent Owned Fully or in Part by Network				
		Overall	ABC	CBS	NBC	Fox		Overall	ABC	CBS	NBC	Fox
1990	106	11.3%	10.0%	4.2%	17.1%	11.8%	32	12.5%	0.0%	0.0%	14.3%	33.3%
1991	112	12.5%	13.2%	7.1%	13.0%	17.4%	30	13.3%	18.2%	11.1%	0.0%	20.0%
1992	150	16.0%	20.5%	9.4%	20.9%	11.1%	55	16.4%	21.4%	7.7%	44.4%	5.3%
1993	125	20.8%	22.6%	28.6%	17.2%	16.2%	50	16.0%	21.4%	20.0%	10.0%	9.1%
1994	116	16.4%	19.0%	15.6%	18.8%	12.9%	39	15.4%	33.3%	9.1%	22.2%	7.7%
1995	126	22.2%	11.4%	12.9%	30.0%	36.7%	46	19.6%	9.1%	9.1%	33.3%	26.7%
1996	113	18.6%	23.3%	17.4%	11.1%	21.2%	38	26.3%	20.0%	20.0%	20.0%	50.0%
1997	94	35.1%	29.2%	23.8%	47.6%	39.3%	35	37.1%	18.2%	12.5%	55.6%	71.4%
1998	102	35.3%	17.9%	36.8%	46.7%	40.0%	33	39.4%	10.0%	80.0%	50.0%	37.5%
1999	87	47.1%	47.8%	57.9%	50.0%	36.0%	36	58.3%	66.7%	100.0%	50.0%	22.2%
2000	99	54.5%	75.0%	60.0%	51.7%	44.1%	32	56.3%	80.0%	50.0%	58.3%	44.4%
2001	101	43.6%	50.0%	50.0%	36.7%	40.7%	32	56.3%	42.9%	77.8%	44.4%	57.1%
2002	94	70.2%	80.6%	47.6%	95.0%	54.5%	40	77.5%	83.3%	66.7%	100.0%	60.0%

William T. Bielby and Denice D. Bielby, Sociology Department, University of California, Santa Barbara, "Controlling Primetime: Organizational Concentration And Network Television Programming Strategies," forthcoming article in Journal of Broadcasting and Electronic Media, Table 1, p. 40.

THE WHITE HOUSE

WASHINGTON

November 2, 1983

Dear Pete:

The President has asked me to respond to your letter of July 20, 1983 expressing your concern regarding the syndication and financial interest rule in the television industry. We appreciate your views and have since been in the process of examining all sides of the issue.

As you know, the President has consistently favored government efforts to promote vigorous competition; however, he has determined in this instance, in light of changing market conditions in the television and program production industries, additional review of the consequences of repeal of the rule is necessary. Accordingly, after careful consideration of this matter, the President has decided to support a two-year legislatively-mandated moratorium on any change in the syndication and financial interest rule. A two-year moratorium would allow us to give the issue further study and monitor future changes in the marketplace, while at the same time ensuring continuing healthy competition within the industry.

With warm regards,

Sincerely,



Edwin Meese III
Counsellor to the President

The Honorable Pete Wilson
United States Senate
Washington, D.C. 20510

THE WHITE HOUSE
WASHINGTON

November 1, 1983

Dear Pete:

Last July 20th you wrote me a letter expressing your concern regarding the Financial Interest and Syndication Rules in the television industry. I appreciate your concern and I have since been in the process of examining all sides of the issue.

As you know, I consistently favor government efforts to promote vigorous competition. However, I am convinced that market conditions in the television broadcasting and production industries at this time make the consequences of repeal uncertain. After giving careful consideration to the matter, I have decided to support a two-year legislatively-mandated moratorium on any change in the FCC Financial Interest and Syndication Rules. A two-year moratorium will allow us to give the issue further study and monitor future changes in the marketplace, while at the same time ensuring continued healthy competition within the industry.

With warmest regards to you and your constituents.

Sincerely,

The Honorable Pete Wilson
United States Senate
Washington, D.C. 20510

DRAFT: 11/1/83
0739



OFFICE OF ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

April 9, 2003

Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, DC 20554

RE: *Ex Parte* Presentation in a Non-Restricted Proceeding
Initial Regulatory Flexibility Analysis for 2002 Biennial Review – Review of the
Commission’s Broadcast Ownership Rules (MB Dkt. No. 02-277)

Dear Mr. Chairman:

As part of its statutory duty to monitor and report on an agency’s compliance with the Regulatory Flexibility Act of 1980 (“RFA”), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”),¹ the Office of Advocacy of the U.S. Small Business Administration (“Advocacy”), has reviewed the Federal Communications Commission’s (“FCC” or “Commission”) compliance with the RFA’s requirements for the Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding.² The Office of Advocacy is an independent entity within the U.S. Small Business Administration (“SBA”), so the views expressed by the Office of Advocacy do not necessarily reflect the views of the SBA or the Administration.

In the NPRM, the Commission seeks to review its broadcast ownership rules as required by Section 202 of the Telecommunications Act of 1996.³ The Commission conducted an Initial Regulatory Flexibility Analysis (“IRFA”), which stated that there was no impact on small businesses from the proposed rulemaking. Advocacy disagrees with the Commission’s assessment that the rule will have no impact on small businesses.

Advocacy recommends that the Commission treat this NPRM as a Notice of Inquiry (“NOI”) and

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

² *In the Matter of* 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, MB Dkt. No. 02-227, MM Dkt. No. 01-235, MM Dkt. No. 01-317, MM Dkt. No. 00-244, FCC 02-249 (rel. Sept. 23, 2002).

³ NPRM, paras. 1-8.

issue a further notice of proposed rulemaking (“FNRPM”). The Commission’s NPRM seeks extensive comment on issue areas rather than specific proposals or tentative conclusions. These sorts of requests to the public are better suited for an NOI than a proposed rule. Furthermore, when the Commission proposes specific rules in an FNPRM, it should complete a supplemental initial regulatory flexibility analysis (“IRFA”) to comply with the RFA.⁴

1. Advocacy Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305⁵ to represent the views and interests of small business within the Federal government. Advocacy’s statutory duties include serving as a focal point for the receipt of complaints concerning the government’s policies as they affect small business, developing proposals for changes in Federal agencies’ policies, and communicating these proposals to the agencies.⁶ Advocacy also has a statutory duty to monitor and report to Congress on the Commission’s compliance with the RFA.

Congress designed the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.⁷ The major objectives of the RFA are: (1) to increase agency awareness and understanding of the potential disproportionate impact of regulations on small business; (2) to require that agencies communicate and explain their findings to the public and make these explanations transparent; and (3) to encourage agencies to use flexibility and provide regulatory relief to small entities where feasible and appropriate to its public policy objectives.⁸ The RFA does not seek preferential treatment for small businesses. Rather, it establishes an analytical requirement for determining how public issues can best be resolved without erecting barriers to competition. To this end, the RFA requires the agencies to analyze the economic impact of proposed regulations on different-sized entities, estimate each rule’s effectiveness in addressing the agency’s purpose for the rule, and consider alternatives that will achieve the rule’s objectives while minimizing any disproportionate burden on small entities.⁹

On August 14, 2002, President George W. Bush signed Executive Order 13272 that requires federal agencies to implement policies protecting small businesses when writing new rules and regulations.¹⁰ This Executive Order authorizes Advocacy to provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regulatory Affairs of the Office of Management and Budget.¹¹ It also requires agencies to give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. The agency shall include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency’s response to any written comments submitted by

⁴ Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

⁵ Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637).

⁶ 15 U.S.C. § 634(c)(1)-(4).

⁷ 5 U.S.C. § 601(4)-(5).

⁸ See generally, Office of Advocacy, U.S. Small Business Administration, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, 1998 (“*Advocacy 1998 RFA Implementation Guide*”).

⁹ 5 U.S.C. § 604.

¹⁰ Exec. Order. No. 13272 § 1, 67 Fed. Reg. 53,461 (2002).

¹¹ Id. at § 2(c).

Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.¹²

2. The NPRM Does Not Propose Any Concrete Rules and Is Better Suited as a Notice of Inquiry

In the NPRM the Commission does not propose the actual terms or drafts of any proposed rules. Instead, the Commission sought general comment on dozens, if not hundreds, of issues that addressed the value of diversity, competition, and localism. This is valuable information, and the Commission did an excellent job asking thorough and provocative questions. While the questions are certainly worthwhile, it does not counter the fact that the Commission is not proposing anything concrete in its proposed rulemaking.

This manner of soliciting information from commenters is more consistent with an NOI than an NPRM. The purpose of an NOI is to gather information and intelligence about the scope of a problem, factors that contribute to a problem, the benefits, or limitations of different regulatory alternatives and the different impacts of each alternative. The FCC should use an NOI whenever the Commission lacks information about the industry to be regulated or the exact nature of the problem to be addressed.

This style of rulemaking is very costly to the telecommunications industry. By issuing an NPRM that lacks specific proposals, the FCC creates uncertainty in the industry, resulting in thousands of comments that, at best, can only speculate as to what action the FCC may take and the potential impacts. Commenters spend resources answering hundreds of questions, and do so repeatedly over the comment period, the reply comment period, and the *ex-parte* period. Consequently, the lack of specificity is costly and potentially harmful to the industry and its customers. Small businesses, in particular, are often overwhelmed by the scope of a vague NPRM and cannot contribute meaningfully to the rulemaking process. If the FCC instead issues an NOI, interested parties would have answered the questions raised with the added comfort of knowing that they would later have the opportunity to comment on a more detailed and specific proposed rule, reducing anxiety and the need to address all possible iterations of regulatory approaches the FCC could conceivably adopt.

This is the not the first time the Commission has issued an NPRM when an NOI is more appropriate. Advocacy has sent letters to the Commission in other proceedings, commenting that the Commission is using the NPRM process to gather basic information from industry and without providing specific information on the terms of the regulatory proposal.¹³ Consistent with

¹² *Id.* at § 3(c).

¹³ Comments of the Office of Advocacy, U.S. Small Business Administration, to the *Notice of Proposed Rulemaking* in MM Dkt. Nos 01-317, 00-244 (March 27, 2002); Letter from Thomas M. Sullivan, Chief Counsel, Office of Advocacy to Michael K. Powell, Chairman, Federal Communications Commission, in CC Dkt. No. 01-338; CC Dkt. No. 96-98; CC Dkt No. 98-147 (February 5, 2003); Letter from Mary K. Ryan, Deputy Chief Counsel, Office of Advocacy to Michael K. Powell, Chairman, Federal Communications Commission, in MM Dkt. No. 00-167 (February 6, 2001); Comments of the Office of Advocacy, U.S. Small Business Administration, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 01-92 (November 6, 2001).

our earlier statements, Advocacy encourages the Commission to utilize NOIs and reserve NPRMs for when the Commission is prepared to propose rules as opposed to soliciting information.

3. The IRFA Does Not Address the Impact on Small Businesses

In its IRFA, the Commission described the need for and the objectives of the proposed rules, as well as identified the affected classes of small businesses.¹⁴ However, the FCC did not analyze the impact that the proposed rule would have on small businesses.¹⁵ Instead, the Commission limits its review of the impact to reporting and recording keeping requirements of which it says there are none.¹⁶

The requirements of an IRFA are more than reporting and record keeping requirements. The RFA requires the Commission to describe all impacts, not just reporting and record keeping.¹⁷ Therefore, the Commission must analyze effects such as the impact on small broadcast affiliates, the impact on small advertisers, or the impact on small program providers, if there is further consolidation.

The Commission's failure to conduct a complete analysis of the impact on small businesses is a direct result of the Commission not proposing specific rules in the NPRM. Because there are no concrete rules, it is difficult for the Commission, Advocacy, or small businesses to accurately predict and analyze what the impacts of the rules will be. As a consequence, any substantive analysis of the proposed rule is nearly impossible. We believe that by not proposing specific rules, the Commission is limiting the ability of small businesses to provide the agency with needed information on the impacts of the rule and possible alternatives that will lessen any impacts.

4. Commission Should Issue an FNPRM and Conduct a Supplemental IRFA After Specific Rules Are Proposed

Unless the Commission issues a supplemental rulemaking, the next step in the Commission process would be a final rule adopting specific language on which the public would not have had a chance to comment. This lack of specificity is not consistent with the Administrative Procedure Act and frustrates the spirit of the RFA, as it is difficult for small businesses to comment meaningfully.

Rather than immediately publish a final rule, Advocacy recommends that the Commission issue an FNPRM. This will allow the Commission to utilize the comments gathered in this NPRM while providing small businesses the opportunity to comment on specific rules before the Commission adopts them.

¹⁴ NPRM, Appendix A, p. 56.

¹⁵ Advocacy has identified several issues that would have an impact on small businesses in paragraphs. 39, 50, 55, 59, 70, 97, 107, 144, and 151 of the NPRM. Advocacy does not intend this list to be exhaustive.

¹⁶ NPRM, Appendix A, p. 62.

¹⁷ 5 U.S.C. § 603(a).

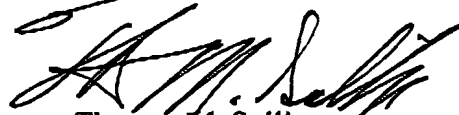
Even if the Commission does not issue a FNPRM, the Commission should issue a supplemental IRFA to examine any rules that the Commission decides to adopt in a final rule. The Commission stated that the proposed rule had no impacts on small businesses in the current IRFA, and consequently the Commission has done no analysis of impacts on small businesses. If the FCC releases a final rule that does contain small business impacts, it will be adopting rules on which small businesses have not been had the opportunity to comment. This is a violation of the RFA and could result in the courts remanding the entire rule.¹⁸ The Commission must inform small businesses of the regulatory impacts that will result from the rulemaking and give them a chance to respond. The proper avenue for this is a supplemental IRFA.

Conclusion

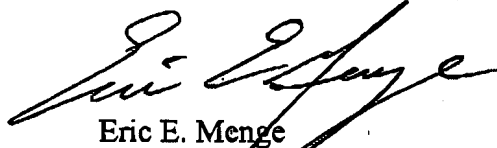
The Commission's NPRM seeks comment on issue areas rather than specific proposals or tentative conclusions. Because of a lack of specific regulatory proposals in the proposed rulemaking, Advocacy recommends that the Commission treat this NPRM as an NOI and issue an FNRPM when the FCC is in a position to consider concrete rules. When the Commission proposes specific rules in an FNPRM, it should complete a supplemental IRFA to comply with the RFA.

Thank you for your consideration of these matters, and please do not hesitate to contact me or Eric Menge of my staff at (202) 205-6933 or eric.menge@sba.gov if you have questions, comments, or concerns.

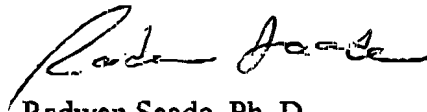
Sincerely,



Thomas M. Sullivan
Chief Counsel for Advocacy



Eric E. Menge
Assistant Chief Counsel for
Telecommunications



Radwan Saade, Ph. D.
Regulatory Economist

¹⁸ Northwest Mining Assoc. v. Babbitt, 5 F. Supp. 2d 9 (D.D.C. 1998) (recognizing the public interest in preserving the right of parties which are affected by government regulation to be adequately informed when their interests are at stake and participate in the regulatory process as directed by Congress).

cc:

Commissioner Kathleen Q. Abernathy

Commissioner Michael J. Copps

Commissioner Kevin J. Martin

Commissioner Jonathan S. Adelstein

W. Kenneth Ferree, Chief, Media Bureau

Carolyn Fleming Williams, Director, Office of Communications Business Opportunities

John D. Graham, Administrator, Office of Information and Regulatory Affairs, Office of
Management and Budget.